(1)
Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition for Writ if Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's misapplication of the standards set in *Connick v. Myers* derogates the holding of the Supreme Court that, the "right" of a municipal employee to protest racial discrimination is a matter inherently of public concern and is in conflict with other decisions of the Supreme Court and Circuit Courts.

II. Whether the Seventh Circuit invaded the province of the jury when it failed to comply with the standard of review regarding granting a judgment n.o.v. by making many factual and credibility determinations in favor of the movant.

LIST OF ALL PARTIES TO PROCEEDINGS IN THE APPELLATE COURT

The caption to the case contains the names of all the parties in this petition. Rebecca Smith was a party plaintiff/appellant in the proceedings in the lower courts. Rebecca Smith is not a party in this petition.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Cynthia Taylor, respectfully petitions This Honorable Court to issue a writ of certiorari to the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The published opinion of the Seventh Circuit Court of Appeals was filed on May 24, 2000 (*Taylor v. Carmouche*, __F.3d__ (7th Cir. 2000)), and is set forth in the Appendix hereto (App. A). The order of the Seventh Circuit Court of Appeals denying Cynthia Taylor's petition for rehearing was filed on July 20, 2000, and is set forth in the Appendix hereto (App. C).

The unpublished Memorandum of Decision of the District Court for the Northern District of Indiana was filed on July 19, 1999 (*Cynthia Taylor and Rebecca Smith v. Hamilton Carmouche, Margaret Felton and City of Gary, Indiana*, 2:96 cv 504) and is set forth in the Appendix hereto (App. B).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the District Court of the Northern District of Indiana was entered on May 24, 2000 (App. A). The petitioner petitioned the Court of Appeals for rehearing which was denied on July 20, 2000. (App. C). This petition for

writ of certiorari is filed within ninety (90) days from that date, 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States provides, in pertinent part, "Congress shall make no law abridging the freedom of speech..."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act of 1964 - Title VII provides in pertinent part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice...or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."

42 U.S.C. Section 1983 of the Civil Rights Act provides, in pertinent part, "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Federal Rule of Civil Procedure 50
(a) Judgment as a Matter of Law. (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

In 1993 and 1994, Cynthia Taylor and Rebecca Smith were each employed at the City of Gary Law Department. Cynthia Taylor was an assistant city attorney and Rebecca Smith was a secretary. During the course of their employment, they complained about racist behavior exhibited by Margaret Felton and

Hamilton Carmouche. Hamilton Carmouche was corporation counsel for the City of Gary and Margaret Felton later during this time period became city attorney. Cynthia Taylor and Rebecca Smith complained about the racist behavior in the Law Department to numerous individuals in the City including the Mayor and Deputy Mayor. During this period, Cynthia Taylor and Rebecca Smith were subjected to various adverse employment actions. At one point, Cynthia Taylor testified on behalf of Rebecca Smith at Smith's grievance hearing.

After Smith's grievance hearing Cynthia Taylor suffered more adverse employment actions and filed a complaint with the Department of Labor alleging discrimination and retaliation. During this same time, Cynthia Taylor was pregnant and suffering from a work related leg injury. Prior to Smith's grievance hearing, the City accommodated Cynthia Taylor's injury and she worked in a third floor Law Department office. The only way to access the main Law Department office was to climb more than two flights of stairs.

Cynthia Taylor was initially denied a medical or maternity leave. After a partial grievance hearing Taylor was granted maternity leave. Upon Cynthia Taylor's return from maternity leave, she was in need of physical therapy a few hours a week and was denied return to work without a medical evaluation from the City's doctor. This medical evaluation request was not

made prior to Taylor's leave and was never made when she sustained the leg injury nor was it requested in reference to her pregnancy. After receiving the evaluation, the City's doctor placed a restricted work schedule on Cynthia Taylor because she was unable to climb the stairs to the main Law Office which Hamilton Carmouche and Margaret Felton insisted that she do. Hamilton Carmouche refused to allow Cynthia Taylor to return to work.

Cynthia Taylor and Rebecca Smith brought state and federal claims against the City of Gary, Indiana, Hamilton Carmouche and Margaret Felton arising out of their employment in the Gary Corporation Counsel's office and the termination of that employment. Taylor and Smith alleged retaliation for the exercise of their rights under the First and Fourteenth Amendments to the United States Constitution, racial and sexual discrimination in employment, and other state and federal claims. A four-day jury trial was held from July 6 to July 10, 1998. At the close of plaintiffs' case, the Magistrate Judge entered judgment as a matter of law for the defendants on substantial portions of the First Amendment claims in this case, resulting in the dismissal of Smith from this case. The Magistrate Judge ruled that Taylor and Smith's speech was not a matter of public concern, and only addressed their private interests.

The remaining portion of Taylor's First Amendment claim was submitted to the jury, which returned a

verdict in favor of Taylor for and against defendant Carmouche for $20,000 in compensatory damages and $60,000 in punitive damages. On post-trial motions, the Magistrate Judge entered judgment n.o.v. for Carmouche and denied all other relief requested by Plaintiffs. In granting the judgment n.o.v., the magistrate judge ruled that the gap in time between the filing of the letter to the Department of Labor and the refusal to reinstate her upon her return from maternity leave was to remote to find retaliation.

Cynthia Taylor and Rebecca Smith appealed to the Seventh Circuit Court of Appeals. On May 24, 2000, The Court of Appeals issued its decision affirming the District Court's ruling. The Court of Appeals affirmed the District Court's ruling on the directed verdict but ruled that the District Court erred in its reasoning for granting the judgment n.o.v. The Court of Appeals then ruled that an unrelated factual issue justified the granting of the judgment n.o.v. There was a dissent by Justice Williams who disagreed that Taylor and Smith's speech was not of public concern and thus not entitled to constitutional protection. Justice Williams concurred with the majority decision granting the judgment n.o.v. Cynthia Taylor petitioned the Court of Appeals for rehearing. The petition was denied on July 20, 2000.

REASONS FOR GRANTING THE WRIT

This Petition Should Be Granted Because The Seventh Circuit Has Derogated the Holding of the

United States Supreme Court in *Connick v. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern. The Seventh Circuit's Ruling That an Employee's Complaints That a Supervisor Acted in a Racist Manner Is Not Protected Speech Because it Is Not a Political View about What Legal Policies the Employer Should Adopt; and, That an Employee's Subpoenaed Testimony on Behalf of a Coworker Is Not Protected Because it Occurred in the Context of an Internal Grievance Hearing Is in Conflict with Decisions of the United States Supreme Court and the Circuit Courts. Additionally, Although Federal Rule of Civil Procedure 50 Requires That All Evidence and Inferences Must Be Taken in the Light Most Favorable to the Non-Moving Party, the Seventh Circuit Invaded the Province of the Jury When it Made Numerous Factual and Credibility Determinations After the Jury's Verdict While Drawing Inferences in Favor of the Moving Party.

I.

The Seventh Circuit Has Derogated the Holding of the United States Supreme Court in *Connick V. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern and Conflicts with other Decisions of The United States Supreme Court and The Seventh Circuit.

The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government" and it occupies the "highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684 (1983). In *Connick*, this Court held that the "right" of a municipal employee to "*protest racial discrimination [is] a matter inherently of public concern.*" *Connick, supra*, 103 S.Ct. at 1691, n. 8 (emphasis added), citing *Givhan v. Western. Line Consolidated School Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97 (1979). In the instant case, the petitioner's protest against racism in the City of Gary Law Department, an agency with a duty to uphold the law for its citizens is unquestionably a matter of public concern.

In *Collins v. State of Illinois*, 830 F.2d 692, 702 (7th Cir. 1987), the court held:

> The relative burdens for proving a retaliation claim parallel those established for proving a race discrimination claim. See *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280-81 (7th Cir. 1985). Plaintiff first has the burden of establishing a prima facie case of retaliation. The burden then shifts to defendants to articulate a legitimate nondiscriminatory reason for the challenged action. If defendants make that

> articulation, the burden shifts back to plaintiff to prove that the defendants' proffered reason is a pretext for an underlying retaliatory reason.

To establish a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) that there is a causal link between the protected expression and the adverse action. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, ___ (2000); *Mathur v. Board of Trustees of So. Ill. Univ.*, 207 F.3d 938 (7th Cir. 2000).

In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court delineated the standard of review for ruling on a judgment as a matter of law. "Under Rule 50, a court should render judgment as a matter of law when " a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"." *Reeves* at 2109. This Court stated that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105, ___ (2000) In *Reeves*, this Court held:

> "... in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg.,Inc.*, 494 U.S. 545,554-555 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby, supra* at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.... That is, the court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses"." *Reeves* at 120 S. Ct. 2110.

In the instant case, the Trial Court and Court of Appeals made numerous gross factual and credibility determinations contrary to this well-settled rule as outlined above. Each critical issue decided in this case is marred by this defect. For example, Taylor's argument since the inception of this case is that she complained through the chain of command at the City of Gary about

racism in the Law Department; that she spoke out on behalf of the African-American secretaries and African-American attorneys; that the only grievance she filed was filed after she was suspended and denied medical leave; and that she suffered adverse employment actions as a result, the most severe actions occurring after testifying at the grievance hearing for Smith. In spite of the evidence, these courts continue to rule that her speech was about internal grievances. To reach this conclusion, the Court made many erroneous factual determinations, judged credibility and weighed evidence.

The Seventh Circuit's decision in the instant case, conflicts with decisions of this Court and the Circuit Courts, cited as follows: *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1691, n. 8 (1983); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979); and *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997); *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998); *Marshall v. Porter County Plan Commission*, 32 F.3d 1215 (7th Cir. 1994); and *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465 (7th Cir. 1993); *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878 (1994); and *Feldman v. Ho*, 171 F.3d 494 (7th Cir. 1999); *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir.. 1997); *Collins v. State of Illinois*, 830 F.2d 692, 697 (7th Cir. 1987); *Cross v. Cleaver*, 142 F.3d 1059 (7th Cir. 1998); *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 746 (7th Cir. 1999); *Brady v. Southern Railway*, 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct.232 (1943); *Christie v. Foremost Insurance Co.*, 785 F.2d 584, 585-86 (7th Cir. 1986); *Freeman v. Franzen*, 695 F.2d 485, 489 (7th Cir. 1982), cert. denied, 463 U.S. 1214, 77

L. Ed. 2d 1400, 103 S. Ct. 3553 (1983); and *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 515 (7th Cir. 1990); *Mathur v. Board of Trustees*, No. 98-3431 (7th Cir. March 27, 2000), citing *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 634 (7th Cir. 1996). Consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

In addition to the erroneous factual determinations and misapplication of the standard of review, the Court of Appeals failed to distinguish between the speech of Taylor, an attorney, and that of Smith, a secretary. The thrust of the court's opinion was to dismiss the speech in this case as petty employment grievances although it was petitioner's contention that many of the office problems were a result of Felton's racist behavior and the grievances resulted from retaliatory conduct by Felton and Carmouche. Taylor's speech was unquestionably about race.

The Seventh Circuit affirmed the District Court ruling, relying on its interpretation of *Connick* stating that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record."(App. B-14). As stated above, the court did not review the record as a whole in the light most favorable to petitioner. Instead, the court made many factual and credibility determinations in favor of the defendants who lacked any credibility at trial.

Taylor's speech was unquestionably about race. The only true issue under *Connick* would be whether the City's interests in the efficiency of its legal department outweigh the employee's interests in speaking out. Taylor's interest in free speech was not outweighed by her employers' interest in a smooth, efficient law department. In *Rakin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court held that where an employee did not hold a policymaking, public contact or confidential position, the danger that her speech would interfere with her employer's operations was minimal. In *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995), the court held that where the plaintiff's speech concerned internal personnel practices, the employer's burden was not onerous. Here, Taylor was a low-ranking attorney in a municipal law office that spoke out against racism and sexism in general and as it affected internal decisions and internal office functions. The alleged "burden" to the City of Gary from this speech is purely speculative; certainly no evidence of burden was offered. Moreover, the evidence showed that the Gary law department was dysfunctional, and that much of the blame is attributable to Carmouche's viscous, ugly racism that permeated the office and affected every decision made in that office.

Significantly, any claimed disruption of the office resulting from plaintiff's statements to Carmouche that Felton is a racist etc., resulted not from plaintiff's speech, but *from Carmouche's repeated acts of informing Felton that the plaintiffs had spoken out against her racism, i.e.* which was the equivalent of Carmouche pouring gasoline on a fire.

It is disingenuous for the employer to argue that speech which is privately communicated to the supervisor, and at the request of that supervisor, results in an unacceptable burden to the employer, where the only possible burden results from the supervisor's desire to share the private communication with the intermediary-level employee that was the subject of the speech. Likewise, it is disingenuous for the employer to claim any burden from testimony given at a Personnel Committee grievance hearing conducted in accordance with the employer's personnel procedures.

However, the Seventh Circuit found that Taylor's speech was not protected for three reasons which the dissent persuasively refutes: First, the court held that Taylor was only complaining about labor-management issues within the context of the personnel hierarchy. (App. A-7) However:

a. The court ignored evidence that Taylor spoke to the Mayor and Deputy Mayor, outside personnel channels.

b. The court derogates the importance of Taylor's subpoenaed testimony on behalf of Smith. Cf. *Tindall v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994)(holding that testimony in a legal proceeding on behalf of coworkers was a matter of public concern) (App. A-12, Dissent,). The unsupported holding that testimony in an internal grievance procedure (as opposed to a lawsuit) is not protected is bad policy. Employees should be protected whenever they testify under oath. The

sanctity of testimonial proceedings is advanced, not lessened, by the enforcement of laws protecting the witnesses from retaliation.

c. Moreover, this Court should resolve the inconsistency between argument disfavoring speech in purely internal channels, and the argument disfavoring speech that would compromise the government's interests as an employer in the efficiencies of its offices. The correct balance is set forth in cases such as *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979); and *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) (even private protests through internal channels do not deprive speech of constitutional protection). (App. A-12, Dissent).

Second, the court found that Taylor was protesting in her capacity as an employee, not a citizen. (App. A-7-9) Here, in an effort to convince that Taylor was engaged in a petty employee grievance, i.e. that she was jealous of Felton, the panel again ignored evidence, refuting the "jealousy" charge and improperly decided a fact issue in favor of the Appellee.

More importantly, the court erred in holding that protests against perceived racist acts should not be protected absent a showing that the employee was engaged in a public debate as opposed to contending that "race influenced what happened to them on the job." (App. A-8). This holding would eradicate First Amendment protection whenever a public employee

protests conduct that violated a *settled public policy* that was already *beyond debate* among persons of goodwill (i.e. that racism in public employment cannot be tolerated). With due respect to the majority, there is simply no room for "*debate*" as to whether "*it was desirable for Gary to hire racists.*" (App. A- 8). That "debate" was settled long ago with the adoption of the Equal Protection Clause. The challenge for more than two centuries has been to combat racism whenever it surfaces, particularly in government. For this reason, protests against racism are inherently a matter of public concern. *Connick, supra.* The First Amendment must protect speech in its practical applications, when it is applied to enforce a policy that is already beyond debate.

In *Brown v. Disciplinary Committee of Edgerton*, 97 F.3d 969, 972 (7th Cir. 1996), the court held that "public concern" does "not mean matters of *transcendental importance* -they mean matters in which the public might be interested, as distinct from wholly-personal grievances." (citations omitted). Taylor's speech should be protected under this standard because: (a) as a matter of law, the public is interested in whether the City of Gary hired racists who were discriminating against the African-American staff; and (b) Taylor, in speaking out for the secretaries, was not advancing a "wholly-personal grievance" (despite the court's attempt to tarnish her with the disputed claim that she was jealous of Felton).[1]

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[1] IF TAYLOR HAD MIXED MOTIVES BETWEEN HER PERSONAL INTERESTS AND HER CONCERN OVER RACISM, HER SPEECH

Third, the court characterized Taylor's speech as a "mundane issue of fact" and as "defamatory", and held that persons who make "*unsupported* defamatory statement[s] may be penalized without offending the first amendment." (App. A-10). As Judge Williams explained, the court has confused the law of defamation with public employee speech. (App. A-13, Dissent). The proper inquiry here is whether the speech was a matter of public concern and whether the government's interests as employer in the efficiency of the office were compromised. These questions should have been resolved in Taylor's favor. The court improperly characterized the allegations of racism as "mundane" statements that "Felton is a racist" as though that personal characterization was divorced from Felton's conduct, her attitude and her expression of that attitude in her communications with secretaries as typified by her "pack of dogs" reference. Apparently the Seventh Circuit sympathized with Felton for trying to be a "taskmaster" and views the African-American secretaries as insubordinate. (App. A-2). In other words, the court engaged in impermissible fact-finding and apparently drew its own conclusion that the charges of racism where "unsupported." (App. A-11). Carmouche made this argument at trial, and he lost. For the Seventh Circuit to adopt that view on appeal is clearly erroneous, since Taylor was entitled to have all disputed facts and all

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529; *MARSHALL V. PORTER COUNTY PLAN COMMISSION*, 32 F. 3D 1215; AND *HARTMAN V. BOARD OF TRUSTEES OF COMMUNITY COLLEGE DIST. NO. 508*, 4 F.3D 465.

inferences therefrom decided in her favor.

Moreover, the Seventh Circuit did not take seriously the ample, unrebutted testimony of Carmouche's foul, racist insults. Even giving credence to an alleged effort to improve efficiency, the racially inflammatory comments created a hostile, abusive atmosphere that Taylor was justified in protesting.

In sum, the Seventh Circuit begged the question of whether the accusations against Felton and Carmouche were unsupported. When Taylor protested her supervisors' racism, the City of Gary could have, and should have, held internal hearings to determine if the accusations were substantiated. The City abdicated this responsibility and instead permitted Carmouche to retaliate against the protesting employees. There is no principle of law that would allow the City (in its capacity as an employer instead of sovereign) to terminate Taylor, without giving her a hearing, for the express reason that she accused someone of racism. Yet, the Seventh Circuit permits Carmouche to constructively discharge Taylor and to otherwise retaliate against her because he, Carmouche, supposedly determined, all by himself, that Taylor was wrong (and he was right). This grant of power to Carmouche is far too excessive and exceeds any legitimate interests of the government as employer. For all these reasons, and as stated in Judge Williams' dissent, the Seventh Circuit erred.

II.

THE RULE THAT ALL EVIDENCE AND ALL INFERENCES FROM THE EVIDENCE SHALL BE CONSIDERED IN THE NON-MOVANT'S FAVOR IN A JUDGMENT N.O.V. MUST BE REAFFIRMED.

The Seventh Circuit agreed with Appellants that the Magistrate Judge erred in his reasons for setting aside the jury's verdict for Taylor and granting Carmouche judgment as a matter of law. However, the court found a new reason to affirm the rejection of the verdict for Taylor by holding that there was an absence of evidence that Carmouche imposed a "penalty" on Taylor as a result of her letter to the DOL on September 23, 1994. (App. A-6). This holding contradicts the Magistrate Judge's ruling that the issue of constructive discharge after the DOL letter was a "question of fact." (R. 77, p. 6,9).

The review of a trial court's grant or denial of judgment as a matter of law under Rule 50 is de novo. *Mathur* at 941. The Seventh Circuit stated, "...we are limited to assessing whether no rational jury could have found for the plaintiff." *Id.* As discussed above, this Court set out the standard for granting or denying a judgment n.o.v. in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105, ___ (2000). This Court stated that the court should review all of the evidence in the record but must draw all reasonable inferences in favor of the nonmoving party, and it may

not make credibility determinations or weigh the evidence. *Reeves citing Lytle v. Household Mfg., Inc.*, 494 U.S. 545,554-555 (1990); *Liberty Lobby, Inc. supra* at 254; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962).

In the instant case, the Seventh Circuit made numerous factual and credibility determinations contrary to this standard. For example, although Carmouche testified that he had policy-making authority in the law department and Taylor was never advised of a medical certification prior to her leave, the court held that there was no penalty since Carmouche was just enforcing a City requirement. The court ignored the fact that Taylor was not required to get a medical certification when she sustained her leg injury or for her maternity leave. The court ignored that despite receiving the certification, Taylor was still refused reinstatement although the medical recommendations submitted after the evaluation were ordered were provided by the City's doctor. The court further ignored that the restrictions placed on Taylor by the City's doctor resulted from the insistence by Carmouche and Felton that Taylor work in the main office which required her to climb more than two flights of stairs. They insisted Taylor work on the fourth floor even though there was a handicap accessible office on the third floor only a few feet from the base of the stairs to the main office.

The Seventh Circuit viewed little if any of the evidence in the light most favorable to the petitioner. In contrast,

the trial judge held:

> "Also on the issue of constructive discharge, I believe that there is a factual dispute as to what happened on December 19th, 1994 and thereafter. Viewing the evidence in the light most favorable to the plaintiff, the jury could find that the plaintiff was left in limbo, did not know whether or not she would have her job back, and that this situation occurred for a period of several months. Under all of the circumstances, I do not believe that I can rule as a matter of law that she was not constructively discharged. I believe that that is an issue for the jury to decide." (R. 77, p.6).

> "...I believe that there is sufficient evidence from which a reasonable jury could find that she was discriminated against when she attempted to return on December 19th; that she was harassed in the form of changing the job duties. There is sufficient evidence from which they could find that the plaintiff was accommodated before she requested the leave, but they refused to accommodate her after the leave." (R. 77, p. 9).

The evidence was more than sufficient to reach the jury and to persuade the jury to render a verdict for Taylor.

The evidence supported the jury's finding that Carmouche caused Taylor's constructive discharge in retaliation for her DOL complaint (and her earlier charges

of racism). The Magistrate Judge was correct in finding that this was a fact issue for the jury. Carmouche's arguments that the events of December 19, 1994, were not retaliatory, were just that - *fact arguments* - which the jury reasonably rejected. "[T]his court may not step in and substitute its view of the contested evidence for the jury's." *Mathur v. Board of Trustees*, No. 98-3431 (7th Cir. March 27, 2000), citing *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 634 (7th Cir. 1996).

It is important that this Court accept this case so that it can remind the subordinate courts that it is impermissible to make credibility determinations, omit or mischaracterize evidence, or to draw adverse inferences against the non-moving party. Review is necessary to help preserve the integrity of the judicial system.

CONCLUSION

Racial discrimination in a governmental office is a matter of public concern. This Court has clearly stated the standard of review for granting a judgment n.o.v. These standards must be maintained. When courts fail to uphold the law or fail to fairly apply the law it chills speech, denies citizens access to the justice system and denigrates the integrity of the judicial system.

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit. Petitioner respectfully urges this Court to reverse the decisions of the courts below and reinstate the jury verdict and/or

remand this case for trial.

Respectfully submitted,

Cynthia I. Taylor,
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APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

No. 99-3117

CYNTHIA TAYLOR and REBECCA SMITH,
Plaintiffs-Appellants,

V.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 2:96 CV 504 -Andrew P. Rodovich, Magistrate Judge.

ARGUED FEBRUARY 22, 2000-DECIDED MAY 24, 2000

Before COFFEY, EASTERBROOK, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge. After Hamilton Carmouche was promoted to Corporation Counsel of Gary, Indiana, he needed to appoint a City Attorney, the No. 2 position. He chose Margaret Felton, which caused an uproar

among the secretaries in the office. It was not just that Felton is white, while Carmouche, most of the other attorneys and staff, and most residents of Gary are black. The problem was that people thought that Felton would be a taskmaster-as she turned out to be (for example, she had a time clock installed). The next year was filled with strife: staff members complained to Carmouche and went over his head when he backed Felton. Displeased with efforts to undermine his position and that of his chosen second in command, Carmouche disciplined several of the insurgents. By the end of that year our two plaintiffs-Cynthia Taylor, a lawyer in the office, and Rebecca Smith, a secretary and paralegal-were gone. Soon Carmouche and Felton followed them to private life, as they had lost the confidence of Mayor Barnes. He, too, was replaced before much longer, having decided not to run for reelection in 1995.

Taylor was hired in June 1993, fresh from law school, and last worked for the Law Department in October 1994, when she took maternity leave. When Taylor sought to return in December, Carmouche demanded a medical clearance in light of Taylor's contention that she needed therapy three days a week to address her inability to climb stairs-a serious problem at the Law Department, located on the fourth floor of a building whose elevator does not go higher than the third floor. Taylor did not respond for a month, and the physician's opinion she finally secured in January said that she could not climb stairs or work more than four hours a day. Carmouche told Taylor that she would be welcome to come back when she could work full time; instead she found other employment and sued for wrongful discharge, contending that Carmouche retaliated against her on account of her complaints about his (and Felton's) stewardship of the Law Department. Claims under the Americans with Disabilities Act, the Family Medical Leave

Act, and Title VII of the Civil Rights Act of 1964 have dropped by the wayside. In this court Taylor's sole contention, based on 42 U.S.C. §1983, is that Carmouche violated her rights under the first amendment by penalizing her for speech about matters of public concern.

Smith joined the Law Department in 1991 and was satisfied with her situation until February 1994, when Felton became City Attorney. Smith complained in general terms to both Carmouche and Mayor Barnes that Felton is a "racist," and Smith perceives that she suffered as a result. Felton issued Smith a written warning for taking too much time for lunch and complained in writing to Carmouche about Smith's unwillingness to attend a professional seminar. Felton delivered a verbal warning for using profanity and failing to treat others with respect. In July Felton spoiled a surprise birthday party that Smith and other secretaries had planned for a co-worker, telling the object of the party to "call off the dogs.' When Smith paged Carmouche to return to the office so that she could complain in writing about Felton's reference to the secretaries as "dogs," Carmouche blew up and called Smith's memo "a piece of shit" and handed her a written order (dated ten days earlier) suspending her for failing to provide certain documents to the City Council in a timely fashion. Smith appealed this suspension to the City's personnel committee, where both she and Taylor testified that Smith was being singled out for alleging that Felton is a racist. Smith prevailed on this grievance but soon was suspended again, and her additional grievances were unsuccessful. (She does not contend in this litigation that any of the additional suspensions was unjustified. Nor does she complain about the multiple written warnings for tardiness and insubordination that were placed in her file before Felton's appointment.) Smith quit in October 1994 and labels this a

constructive discharge.

Carmouche was not pleased by Smith's decision to go over his head, or by Taylor's criticism of his management decisions, and let both of them know it. Taylor, who had been working in a detached office on the third floor (large enough for one attorney and one secretary) to accommodate her leg injury, was ordered back to the fourth floor for closer supervision. She appealed to Gary's chief operating officer, who told her to stay put. Taylor then went home and was not present for a visit from Carmouche and Felton, who suspended her for abandoning her job. Taylor filed another grievance, sought medical leave for the period of the suspension, and also applied for maternity leave.

When Felton initially granted a shorter period of leave than Taylor sought, she filed a grievance about that decision too, this time with the City's personnel director. Taylor returned to work and filed a workers' compensation claim, asserting that all time off had been attributable to an injury sustained on the job, and filed yet another grievance, this time asserting retaliation for testifying at Smith's grievance hearing. For the first time, Taylor went outside the City's personnel hierarchy; she turned to the United States Department of Labor, asserting in a letter that she was the victim not only of retaliation for speech but also of racial discrimination. Meanwhile Taylor commenced her maternity leave, which was to last until mid-December. Taylor reported back to work on December 19, and her answer to Carmouche's question whether she was able to work full time led to his request for a physician's evaluation and what happened then we have already described.

Magistrate Judge Rodovich, presiding by consent under 28 U.S.C. §636(c), granted judgment as a matter of law to the City of Gary on the first amendment claims at the close of

plaintiffs' case. Municipalities are not vicariously liable in litigation under §1983. Monell v. New York Department of Social Services, 436 U.S. 658 (1978). That Carmouche was a department head does not affect application of the Monell principle. Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992). Unless the City had a policy of retaliating against protected speech-and neither Taylor nor Smith contends this-it cannot be liable. If Carmouche or Felton retaliated against protected speech, then they violated rather than implemented Gary's personnel policy, so the §1983 claim against the City was rightly dismissed.

Evidence concerning plaintiffs' remaining claims showed that Felton alienated the secretaries by insisting that they work harder, that the secretaries perceived her as condescending, and that Carmouche was touchy, insensitive, profane, and in many other respects a poor manager. None of these is a federal offense, however, and the magistrate judge concluded that Smith, at least, had nothing else to go on. After plaintiffs' case the magistrate judge granted judgment as a matter of law against Smith (and in substantial measure against Taylor), ruling that none of the events within the City's chain of command was speech protected by the first amendment against retaliation. All of the statements, protests, and grievances were internal personnel matters, dealing with the situations of the plaintiffs rather than matters of general public concern, the magistrate judge concluded. See Connick v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994). The letter to the Department of Labor, however, was not an internal affair, and retaliation against Taylor for writing this letter could support recovery, the court stated. The jury returned a verdict in Taylor's favor against Carmouche on this theory, awarding a total of $80,000 in damages: $14,000 for lost wages and benefits, $6,000 for other loss, and $60,000

as punitive damages. On all other theories of liability (for example, Title VII and the FMLA), the jury's verdict was for defendants.

After the verdict the court entered judgment as a matter of law in Carmouche's favor under Fed. R. Civ. P. 50(b)(1)(C), and conditionally awarded Carmouche a new trial in the event we should disagree with this disposition. See Fed. R. Civ. P. 50(c)(1). The magistrate judge believed that the three-month lapse between Taylor's letter to the Department of Labor and Carmouche's decision not to allow Taylor to return from leave was too great to support an inference that the former precipitated the latter. Given the rule that all evidence and inferences must be taken in the light most favorable to the verdict, this observation does not permit the court to set aside the jury's conclusion. Taylor went on leave soon after sending the letter, and Carmouche demanded medical clearance the very day she returned. The length of Taylor's maternity leave cannot preclude, as a matter of law, an inference that Carmouche imposed a penalty for criticism.

What does preclude the inference is the absence of any evidence that what Carmouche did was a penalty. Gary requires all employees returning from any health-related leave to provide medical evidence of fitness for duty. Carmouche did no more than enforce this rule. Whatever intentions or hopes Carmouche may have harbored, enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech. (No evidence of record implies that Carmouche enforced the rule selectively.) To find a penalty, therefore, Taylor would have to point to the decision of January 1995, when Carmouche declined to allow her to work part time. But Taylor does not contend that the January 1995 decision was retaliation for her letter to

the Department of Labor.

Although plaintiffs chastise the magistrate judge for removing from the jury's purview the decision whether the remaining grievances and protests dealt with matters of general public concern, their status is a question of law rather than fact, so the court rather than the jury is the proper decision maker. Connick, 461 U.S. at 148 n.7. Our review is plenary, id. at 150 n.10, and we agree with the magistrate judge's resolution. Three principal considerations persuade us that the magistrate judge was right in thinking these grievances covered by Connick.

First, as in Connick, all of the questioned speech took place within the employer's personnel hierarchy and canceled the management of the labor force. Smith and Taylor complained about Felton to Carmouche, and then to Carmouche's superiors. That Gary's personnel committee sometimes takes formal testimony rather than resolving grievances in other ways does not turn the subject from management to politics. In Connick itself ,the Court concluded that some of the speech concerned issues of public concern, but it held that the speech as a whole must be deemed work-related, in large measure because it all occurred within the workplace and concerned supervisory management styles-which is, in the end, pretty much what Smith and Taylor were complaining about.

Second, as in Connick and Waters, Smith and Taylor were protesting in their capacity as employees, not in their capacity as citizens. Their complaints related to their jobs. Taylor believes that she rather than Felton should have been promoted and that her leg injury should have been accommodated by allowing her to continue working on the third floor; Smith believes that she should have been

allowed to hold surprise parties without interference, contends that her belated document delivery was someone else's fault, and believes that her supervisors used too much crude language. These are normal workplace grievances, and statements made in an employment setting about how the tasks should be carried out are appropriate subjects for reaction by management, without constitutional obstacles. Wales v. Board of Education, 120 F.3d 82, 84-85 (7th Cir. 1997). None of the statements was offered as a political view about what legal policies the City of Gary should adopt, or even as a view about the City's organizational structure. Smith and Taylor were not engaged in a debate about whether it was desirable, say, for Gary to hire racists; they contended, rather, that race influenced what happened to them, on the job. None of the defendants' responses affected political discourse. As Justice O'Connor observed in Waters, 511 U.S. at 672-75 (some internal citations omitted):

> [Even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of ... the process of open debate," Cohen v. California, 403 U.S. 15, 24-25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work.... [When an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counter speech. ... [Though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the

governor from firing a high-ranking deputy for doing the same thing. Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees. ...

> This does not, of course, show that the First Amendment should play no role in government employment decisions. Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. ...
> ... [The extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

The key to First Amendment analysis of government

employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Carmouche and Felton acted in their capacity as supervisors of the Law Department rather than as regulators of private speech, which under Waters they may do without violating the first amendment.

Third, Smith and Taylor offered their assertion that Felton is a "racist" the only statement that plaintiffs characterize as raising an issue of public concern-as a proposition of fact rather than of opinion, though it is principally the latter that the first amendment protects. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Stevens v. Tillman*, 855 F.2d 394, 398-402 (7th Cir. 1988). The statement at issue *in Rankin v. McPherson*, 483 U.S. 378 (1987), an employee's wish that the President be assassinated, asserted a political stance. But whether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal court. "Felton is a racist" is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the first amendment. Whether that penalty is delivered in a slander action, in a perjury prosecution, in an award of attorneys' fees for making unsubstantiated allegations, or in the workplace by a suspension, is immaterial to the Constitution. What matters is that defamation of a co-worker may be punished, and as we pointed out in *Feldman*

v. Ho, 171 F.3d 494, 497-98 (7th Cir. 1999), whether a particular defamatory statement is true or false is not a question of constitutional moment, unless the target is a "public figure," which Felton wasn't. See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-23 (1990); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995). The Court held in Waters that so long as the employer honestly and reasonably believes that workplace speech is inappropriate or disruptive, then the Constitution permits a response whether the speech in question was true or false, disruptive or not.

Smith and Taylor pressed their grievances through the machinery Gary provided to its employees. Sometimes they won; sometimes they lost. They were not entitled to take their losses to federal court and ask a jury to second guess, in the name of the Constitution, the decisions of the personnel hierarchy.

AFFIRMED

WILLIAMS, Circuit Judge, dissenting. I respectfully dissent. While I agree with the majority's resolution of Cynthia Taylor's claim relating to her reinstatement after her medical leave, I disagree with the majority's resolution of the plaintiffs' other claims. Specifically, I am not persuaded that the magistrate judge correctly ruled that the plaintiffs' protests within the City of Gary's chain of command did not deal with matters of public concern.

As I read the record, the plaintiffs' protests were an effort to challenge racism in the City's Law Department. In a variety of forums and on several occasions they raised their concerns about racism on the part of both Margaret Felton and Hamilton Carmouche. Most significantly, they went directly to both the City's Mayor and Deputy Mayor in their effort to speak out. And, there is no indication in the record

that their protests were restricted to their individual concerns; rather, it appears that they were speaking out on behalf of the entire office. In light of these facts, I cannot conclude that the plaintiffs' protests regarding racism in the City's Law Department were simple workplace grievances that do not address matters of public concern. See generally *Marshall v. Allen*, 984 F.2d 787, 795-96 (7th Cir. 1993); *Tindall v. Montgomery County Comm'n*, 32 F.3d 1535,1539-40 (11th Cir. 1994). Assuming it is not related entirely to a private dispute between the plaintiff and defendant, racism in a public agency is inherently a matter of public concern. See *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (noting that racial discrimination is a matter inherently of public concern).

Moreover, that the plaintiffs' protests were communicated within the City's chain of command does not strike me as a particularly strong reason to deem their protests matters of private concern. The plaintiffs' should not be penalized for taking advantage of internal procedures for raising their concerns, instead of running to the press the first chance they had. See *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-14 (1979) (expressing one's views privately rather than publicly does not forfeit the first amendment protections afforded a government employee); *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) (noting that the plaintiff-employee was, if anything, to be commended for attempting to go through established internal channels).

As for the majority's suggestion that the plaintiffs' protests about racism in the Law Department were defamatory and therefore are not entitled to constitutional protection, I think the majority collapses two distinct areas of first amendment law. One area regards the limitations placed on a government when it acts in its sovereign capacity to penalize or authorize penalties for defamation.

The other addresses the limitations placed on a government when it acts in its capacity as an employer to discipline one of its employees based on that employee's speech. In light of the distinct situations that must be addressed, quite different standards apply in these two areas. Whether defamation may be punished depends on whether the subject of the defamatory statement is a public official, public figure, or private figure, whether the defamatory statement involves a matter of public concern, and whether the defamatory statement is a proposition of fact. See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion). Moreover, truth is an absolute defense. Whether a government employee may be disciplined for his or her speech depends on whether the speech addresses a matter of public concern and whether the government's interest in efficiency outweighs the employee's interest in speaking out. See generally *Connick v. Myers*, supra; *Pickering v. Board of Education*, 391 U.S. 563 (1968). Truth is not a defense. Collapsing these distinct standards confuses the issues presented by this case. Contrast *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality opinion) (making a point of distinguishing the sorts of the first amendment restrictions placed on a government in its sovereign capacity and those placed on a government in its capacity as an employer). In fact, as this case is plainly governed by the law regarding employee speech, there is no need to discuss the law of defamation at all.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CYNTHIA TAYLOR and REBECCA SMITH, *Plaintiffs*	)	
V.	)	Case No. 2:96 CV 504
HAMILTON CARMOUCHE, Individually and as an Agent of the City of Gary; MARGARET FELTON, Individually and as an Agent of the City of Gary; CITY OF GARY, *Defendants*	)	

ORDER

This matter is before the court on the Post-Trial Motion filed by the defendant, Hamilton Carmouche, on July 16, 1998, the Motion for a New Trial filed by the plaintiffs, Cynthia Taylor and Rebecca Smith, on July 17, 1998, and the Motion for Attorney Fees filed by the plaintiff, Cynthia Taylor, on August 5, 1998. For the reasons set forth below, the defendant's Post-Trial Motion is GRANTED, the plaintiffs, Motion for a New Trial is DENIED, and the Motion for Attorney Fees in DENIED.

Background

The plaintiff, Cynthia Taylor, was employed as an attorney with the City of Gary Law Department from June, 1993, until December, 1994. The plaintiff, Rebecca Smith, worked for the law department as a legal secretary and paralegal from 1991 until her resignation in October, 1994. The defendant, Hamilton Carmouche, was the head of the law department, and the defendant, Margaret Felton, was an attorney with the law department. Taylor, Smith, and Carmouche are African Americans, and Felton is White.

In May, 1993, Carmouche decided to hire another assistant city attorney for the law department and asked Smith, his secretary at the time, for her opinion on whether he should hire Felton or Taylor. Smith claims that Carmouche told her that he thought Taylor was more qualified for the position but that he needed a white attorney. Smith responded to Carmouche's comments telling him that she did not think it was fair to hire Felton simply because of her race. Carmouche ultimately hired both Felton and Taylor.

In February, 1994, Carmouche spoke with Smith about who he should promote to the position of city attorney. Smith told Carmouche that she felt Felton was condescending and a racist and should not be given the position. Taylor likewise expressed an opinion that Felton was a racist and not a good choice for the position. Despite these negative endorsements, Carmouche appointed Felton as the city attorney. According to Smith, Carmouche informed Felton of her comments and that Felton's behavior towards her began to change. Taylor claimed that her relationship with Felton also deteriorated following Felton's appointment as city attorney.

In December, 1993, Taylor slipped and fell down a flight of stairs at work and tore the ligaments in her lower

right leg and ankle. Following the accident, Taylor was given code enforcement responsibilities on the third floor of the law department. This was an accommodation for her condition because Taylor no longer was required to climb a flight of stairs to the fourth floor office of the law department.

On July 22, 1994, Taylor sent Carmouche a memo requesting time off three days a week for physical therapy on her ankle. The need for the physical therapy related to the fact that Taylor had become pregnant, which increased the weight on her ankle, and could not take any medication. Taylor's request for time off was granted.

In August, 1994, Taylor testified at a grievance hearing on behalf of Smith. Her testimony concerned racially discriminatory conduct within the law department. Following the grievance hearing, Taylor received a memo informing her that she was to begin reporting to the fourth floor of the law department. The next day Taylor requested a three-month medical leave.

On September 1, 1994, Felton suspended Taylor five days for walking off the job. Taylor immediately filed a grievance. Before the grievance hearing, however, Taylor returned to work. Although Taylor was permitted to return to the third floor, she was not given code enforcement responsibilities.

On September 23, 1994, Taylor filed a complaint with the Department of Labor. In her complaint, Taylor detailed the events which had transpired between Smith's grievance hearing and her return to work on September 19, 1994. Taylor alleged that the decision not to allow her to take medical leave was in retaliation for her testimony against the defendants at the grievance hearing. Taylor also claimed that the adverse treatment she had received was motivated by racial and gender considerations. According to Taylor, both Felton and Carmouche were aware of the letter.

On September 30, 1994, Taylor notified Carmouche that she planned to begin her maternity leave on October 31, 1994. Felton approved the leave on October 4, 1994, but informed Taylor that upon her return from maternity leave she would be assigned to the fourth floor with no code enforcement responsibilities.

On December 19, 1994, Taylor attempted to return from her maternity leave. When Taylor advised Carmouche that she would need three days of physical therapy a week and that she would have to leave early on those days, he placed her on medical leave pending a medical evaluation on whether Taylor could physically return to work. Taylor never provided the requested medical certification and ultimately sought employment elsewhere.

On September 26, 1996, Taylor filed a complaint against the City of Gary, Hamilton Carmouche, and Margaret Felton alleging discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et. seq., and Title VII of the Civil Rights Act of 1963 ("Title VII"), 42 U.S.C. § 2000e et. seq. In the same complaint, Taylor and Smith also alleged discrimination under 42 U.S.C. § 1981 and a violation of their First and Fourteenth Amendment rights. A pre-trial order submitted by the parties on June 30, 1998, reasserted all the legal claims that were alleged in the complaint with the exception of Smith's Section 1981 claim. Pursuant to Federal Rule of Civil Procedure 16(e), it was held that the pre-trial order superseded the complaint and established the issues to be decided at trial.

A four-day jury trial commenced on July 6, 1998. At the close of the plaintiffs, case in chief, the court granted in part the defendants, motion for a directed verdict and denied Smith's motion to amend the pre-trial order to reassert her Section 1981 claim. As a result, Smith was

dismissed from the case. The defendants later renewed their motion for a judgment as a matter of law following the presentation of all the evidence. The court denied the defendants, motion and submitted the following questions to the jury: 1) did the City of Gary discriminate against Taylor on the basis of sex and/or race in violation of Title VII; 2) did the City of Gary retaliate against Taylor for complaining about racist or sexist conduct in violation of Title VII; 3) did the defendants retaliate against Taylor for filing a workers' compensation claim; 4) did the defendants deny Taylor the right to be restored to her former position, or an equivalent position, upon her return from medical leave in violation of the FMLA; 5) did Carmouche and/or Felton retaliate against Taylor for filing charges of race discrimination in violation of Section 1981; and 6) did Carmouche and/or Felton retaliate against Taylor for protesting racially discriminatory conduct on the part of the defendants in violation of the First Amendment. In response to a jury question concerning the First Amendment retaliation claim, the court instructed the jury that the only protected speech at issue was the September 23, 1994, letter from Taylor to the Department of Labor.

Following its deliberations, the jury returned a verdict against Carmouche on the First Amendment retaliation claim and awarded Taylor $14,000 in lost wages and benefits, $6,000 in other compensatory damages, and $60,000 in punitive damages. On the remaining claims, the jury found in favor of the defendants. Carmouche now moves for a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) or, alternatively, for a new trial pursuant to Federal Rule of Civil Procedure 59(a) on the First Amendment retaliation claim. The plaintiffs also move for a new trial, Taylor on her FMLA and First Amendment retaliation claims and Smith on her Section 1981 and First Amendment retaliation claims. In a separate motion, Taylor requests attorney fees as the prevailing party

pursuant to 42 U.S.C. § 1988.

Discussion

A. Defendant Carmouche's Post-Trial Motion

> Under Federal Rule of Civil Procedure 50(a)(1), the defendant may request a judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the plaintiff. Rule 50(b) provides in part: If, for any reason, the court does not grant a motion for judgment as a matter of law made at-the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.
>
> The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.
>
> . . .

A motion for a judgment as a matter of law after the jury has returned a verdict against a defendant is an extension of the motion made at the close of all of the evidence.

In the instant case, the defendants made a motion for judgment as a matter of law after the plaintiffs, case in chief. The defendants later renewed that motion at the close of all the evidence and before the case was submitted to the jury. Thus, contrary to Taylor's argument, Carmouche is entitled to a judgment as a matter of law if there is no evidence to

support the jury's verdict in favor of Taylor on her First Amendment retaliation claim. See *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997). *Cf. Eastern Natural Gas Corporation v. Aluminum Company of America*, 126 F.3d 996, 1000 (7th Cir. 1997) (finding that defendants failed to preserve a Rule 50 argument by not renewing their motion after the close of evidence); *Umpleby v. Potter & Brumfield, Incorporated*, 69 F.3d 209, 212 (7th Cir. 1995) (same).

To prevail on a First Amendment retaliation claim, the plaintiff must prove (1) that she engaged in constitutionally protected speech and (2) that the defendant retaliated against her because of that speech. *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998); *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997); *Caldwell v. City of Elwood, Indiana*, 959 F.2d 670, 672 (7th Cir. 1992). The plaintiff satisfies the first prong if the speech addressed a matter of public concern and her "interests, as a citizen, in commenting upon these matters outweighed those of the state, as an employer, in promoting the efficiency of the public services performed through its employees." Go 977 F.2d at 355 (*quoting Patkus v. Sangamon-Case Consortium*, 769 F.2d 1251, 1256 (7th Cir. 1985)). See also *Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994); *Township High School Pickering v. Board of Education of District 205*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968) ; *Weicherding v. Reigel*, 160 F. 3d 1139, 1142 (7th Cir. 1998); *Khuans v. School District 110*, 123 F.3d 1010, 1014 (7th Cir. 1997). Resolution of the so-called Pickering balancing test is a question of law which must be decided by the court. *Brown v. Disciplinary Committee of the Edgerton Volunteer Fire Department*, 97 F.3d 969, 974 (7th Cir. 1996); Probst v. Bitzer, 39 F.3d 148, 152 (7th Cir. 1995).

For purposes of his motion, Carmouche does not challenge the court's conclusion that the 1994 letter to the

Department of Labor addressed a matter of public concern, race discrimination by governmental officials, or that Taylor's interest, as a citizen, in commenting on the matter outweighed the City of Gary's interests as an employer. The only issue raised is whether the evidence supports the jury's verdict that Carmouche retaliated against Taylor cause of her letter to the Department of Labor.

Carmouche argues that the evidence presented at trial was insufficient to support the jury's finding that protected speech was a motivating factor in any adverse employment action taken against Taylor. Taylor maintains that there was sufficient evidence to support the jury's finding that Carmouche was aware of the Department of Labor letter and that Carmouche retaliated against her by not allowing her to return from maternity leave on December 19, 1994.

At trial, the burden was on Taylor to prove by a preponderance of the evidence that protected speech was a substantial or motivating factor behind the adverse employment action taken against her. *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999); Johnson v. *University of Wisconsin-Eau Claire*, 70 F.3d 469, 482 (7th Cir. 1995). To meet her burden, Taylor first had to establish that Carmouche knew of the protected speech. *Stagman v. Ryan*, 176 F.3d 986, 999 (7th Cir. 1999). Although the evidence on this issue was not conclusive, it was sufficient for the jury to conclude that Carmouche knew about the Department of Labor letter.

Next, Taylor had to establish a causal link between the protected speech and the adverse employment action taken against her. *Johnson v. Zema Systems Corporation*, 170 F.3d 734, 746 (7th Cir. 1999). "Generally, a plaintiff may establish such a link through evidence that the [adverse employment action) took place on the heels of protected activity." *Filipovic v. K&R Express Systems, Incorporated*, 176 F.3d 390, 399 (7th Cir. 1999). See *King v. Preferred Technical Group*, 166 F.3d

889, 893 (7th Cir. 1999) (finding one day gap between protected activity and adverse employment action sufficient); *Eiland v. Trinity Hospital*, 150 F.3d 747, 753 (7th Cir. 1998) (finding one month gap sufficient); *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 797 (7th Cir. 1997) (finding 2-3 day gap sufficient). On the other hand, "[a] substantial time lapse between the protected activity and the adverse employment action is 'counter-evidence of any causal connection.'" *Filipovic*, 176 F.3d at 399 (finding four month gap between protected activity and adverse employment action insufficient) . *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (finding three month gap insufficient). Where the time frame between the protected activity and the adverse employment action is insufficient to establish a causal link, the plaintiff must present additional evidence which suggests that the defendant's actions were done in retaliation for having engaged in protected speech. See *Zema*, 170 F.3d at 746.

Because the three month gap between the filing of the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification negates any inference of a causal link between the two events, and because Taylor did not come forward with any additional evidence suggesting a causal link between her protected speech and the adverse employment action, no reasonable jury could have found that Carmouche retaliated against Taylor for filing a complaint with the Department of Labor in violation of the First Amendment. After requesting time off for physical therapy in June, 1994, Taylor returned from her maternity leave with another request for time off for more physical therapy. The Gary personnel manual required an employee returning to work to provide a doctor's release, and Carmouche's decision to enforce the requirement was justified.

As an alternative to his motion for judgment as a

matter of law, Carmouche has requested a new trial. Pursuant to Rule 50(c)(1), the court must conditionally rule on Carmouche's alternative motion for a new trial even though the renewed motion for judgment as a matter of law has been granted.

Under Rule 59(a), a new trial may be granted if the district court determines that the verdict was against the weight of the evidence. *Reimer v. Illinois Department of Transportation*, 148 F.3d 800, 806 (7th Cir. 1998); *McClain v. Owens-Corning Fiber-glass Corporation*, 139 F.3d 1124, 1126 (7th Cir. 1998); *Medcom Holding Company v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1997). In determining whether to grant a new trial, a district court must view the evidence along with all reasonable inferences in the light most favorable to the verdict and resolve any conflicts in favor of the nonmoving party. *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 505 (7th Cir. 1997); *Frazell v. Flanigan*, 102 F.3d 877, 882 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Company of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996). "[A] motion for a new trial is addressed to the sound discretion of the trial judge and will be reviewed only for an abuse of discretion." *Robinson v. Lescrenier*, 721 F.2d 1101, 1104 (7th Cir. 1983). See *also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 2222-23, 135 L.Ed.2d 659 (1996); *Reimer*, 148 F.3d at 805; *Medcom*, 106 F.3d 1397. Only if no reasonable basis exists in the record to support the verdict should a new trial be granted. *Tincher*, 118 F.3d at 1129; *Mercado v. Ahmed*, 974 F.2d 863, 866 (7th Cir. 1992).

As previously discussed, there is insufficient evidence to establish a causal link between the filing of the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification. Accordingly, the motion for a new trial is conditionally granted.

B. Plaintiffs' Motion for a New Trial

First, Smith argues that the court should have allowed her to amend the pre-trial order and reassert her Section 1981 claim. Federal Rule of Civil Procedure 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the judgment; but failure so to ,amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

The purpose of Rule 15(b) is to "provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Matter of Prescott*, 805 F.2d 719, 725 (7th Cir. 1986).

Federal Rule of Civil Procedure 16(e) also provides for the modification of pre-trial orders but "only to prevent manifest injustice." At trial, the court found that there would be manifest injustice to the defendants if Smith were allowed

to amend the pre-trial order and reassert her Section 1981 claim.

Contrary to Smith's argument, there is no evidence of manifest injustice as a result of the court's decision to deny her leave to amend the pre-trial order. Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 409 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989); *Majeske v. Fraternal order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996); *Day v. Northern Indiana Public Service Company*, 987 F.Supp. 1105, 1114 (N.D. Ind. 1997). To prevail on a Section 1981 claim, the plaintiff must prove that (1) she is a member of a racial minority, (2) the defendant intended to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); Day, 987 F.Supp. at 1114. A retaliation claim under Section 1981 requires a showing that the retaliation was motivated by racial considerations. *Daniels v. Pipefitters' Association Local Union No. 597*, 945 F.2d 906, 917 (7th Cir. 1991); *McKnight v. General Motors Corporation*, 908 F.2d 104, 111 (7th Cir. 1990). Because the evidence presented by Smith did not support a finding that the defendants discriminated against her because of her race, or retaliated based on racial considerations, she was not entitled to an amendment of the pre-trial order under Rule 15(b) or Rule 16(e).

Next, Taylor argues that the jury's verdict in favor of the defendants on her FMLA claim is against the great weight of the evidence. The FMLA entitles eligible employees to a total of 12 weeks of leave during any 12 month period for, among other reasons, "a serious health condition that makes the employee unable to perform the functions of [her] position." 29 U.S.C. 2612 (a) (1) (D); *Haschmann v. Time Warner Entertainment Company, L.P.*, 151

F.3d 591,604 (7th Cir.. 1998). An employee who exercises his right to leave under the FMLA must be restored to his former position, or an equivalent position, upon his return from leave. 29 U.S.C. § 2614(a)(1). Employers are liable if they "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the [FMLA]." 29 U.S.C. § 2615.

In the court's instructions, the jury was told that "an employer can delay restoration to an employee who fails to provide a fitness for duty certification to return to work." See Court's Instruction No. 19. The jury also was told that

> [the mere fact that Taylor took medical leave and was not reinstated after completion of her leave is not sufficient, in and of itself, to establish her claim under the Family and Medical Leave Act. Taylor has the burden of proving by a preponderance of the evidence that the defendants, actions were motivated because she took medical leave.
>
> Court's Instruction No. 22

Although 29 C.F.R. § 825.301(c) requires an employer to provide written notice to employees detailing any rights or obligations they may have under the FMLA, including any requirement that the employee present a fitness for duty certificate before returning to work, Taylor never requested a jury instruction on the issue, nor did she object to any of the jury instructions addressing her FMLA claim. Taylor's argument that the jury should have found in her favor based on the fact that the defendants did not notify her of the medical certification requirement prior to her FMLA leave has been waived. See *Haley v. Gross*, 86 F.3d 630, 644 (7th Cir. 1996) ("[failure to challenge a jury instruction in a civil case constitutes waiver of that challenge . . . ."); *Abel v. Miller*,

824 F.2d 1522, 1535 (7th Cir. 1987) ("in a civil case each party must live with the legal theory reflected in instructions to which it does not object.,"). Because there was sufficient evidence from which the jury could conclude that the defendants delayed reinstatement based on Taylor's failure to provide the requested medical certification, Taylor is not entitled to a new trial on her FMLA claim.

Finally, Taylor and Smith argue that the court should not have granted a directed verdict on their respective First Amendment retaliation claims. Taylor argues that the evidence supports a finding that the defendants retaliated against her for testifying on behalf of Smith at a grievance hearing held in August of 1994 and for complaining about race discrimination during private meetings with Carmouche, the mayor, and the deputy mayor. Smith argues that the evidence supports a finding that the defendants retaliated against her for challenging Carmouche's decision to hire Felton because she was white, for opposing Carmouche's decision to promote Felton to city attorney because she considered Felton a racist, and for complaining to t he mayor and deputy mayor about discrimination against black attorneys.

On a First Amendment retaliation claim, the court initially must determine as a matter of law whether the particular speech at issue was constitutionally protected, that is, did the speech address a matter of public concern. See *Brown*, 97 F.3d at 974. In determining whether speech addressed a matter of public concern, the court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Button*, 146 F.3d at 529 (quoting in part *Connick v. Myers*, 461 U.S. 139, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)). see also *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1219 (7th Cir. 1994). Of the three factors, the content of the speech is the most important. *Button*, 146 F.3d at 529. The plaintiff's

motive in making the statement also is relevant "because speech that promotes a purely private interest is not protected." *Button*, 146 F.3d at 529 (quoting *Marshall*, 32 F.3d at 1219). In addition, while the plaintiff may speak out on a matter of public interest, that fact alone is insufficient to elevate the speech to a matter of public concern when "the expression addresses only the personal effect upon the employee." *Button*, 146 F.3d at 52930 (quoting *Marshall*, 32 F.3d at 1219).

In this case, the court assumes that racism was discussed both in the law department offices and at Smith's August, 1994, grievance hearing. The court also acknowledges that racism is a matter of public interest. However, an examination of all the evidence demonstrates that the motives behind the plaintiffs, complaints of racism were personal and that they were related solely to disagreements that the plaintiffs had with their own working conditions.

> Where considerations of content, form, and context suggest that an employee raised a topic of societal interest for "personal reasons rather than a desire to air the merits of the issue," or solely to "bolster [his) own position in a private personnel dispute with (his] superiors," the speech is not entitled to First Amendment protection. (internal citations omitted)
>
> *Button*, 146 F.3d at 530

The fact that the plaintiffs made no attempt to raise their complaints of race discrimination in a public forum further supports the conclusion that the plaintiffs, speech was not protected under the First Amendment.

C. Plaintiff's motion for Attorney Fees

Taylor has requested $74,370.50 in attorney's fees as the prevailing party in this litigation. Under 42 U.S.C. § 1988, the prevailing party may recover reasonable attorney's fees "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Based on the decision to grant the defendants, motion for judgment notwithstanding the verdict, Taylor no longer can be considered a prevailing party for purposes of an award of attorney's fees under Section 1988. Taylor's motion therefore is denied.

For the foregoing reasons, the Post-Trial Motion filed by the defendant, Hamilton Carmouche, on July 16, 1998, is GRANTED, the Motion for a New Trial filed by the plaintiffs, Cynthia Taylor and Rebecca Smith, on July 17, 1998, is DENIED, and the Motion for Attorney Fees filed by the plaintiff, Cynthia Taylor, on August 5, 1998, is DENIED. The verdict entered on July 10, 1998, is VACATED. Pursuant to Federal Rule of Civil Procedure 50(c)(1), the defendant Carmouche's request for a new trial is CONDITIONALLY GRANTED.

ENTERED this 19th day of July, 1999.

"s/_____"
Andrew P. Rodovich
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 20, 2000

BEFORE

Hon. John L. Coffey, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

Cynthia Taylor and Rebecca Smith, *Plaintiffs-Appellants,*	) Appeal from the) United States District) Court for the Northern) District of Indiana,
No. 99-3117 v.	) Hammond Division
Hamilton Carmouche, Margaret Felton, and City of Gary, Indiana, *Defendants-Appellees.*	) No. 2:96 CV 50) Andrew P. Rodovich,) Magistrate Judge.

Order

Plaintiff-appellant Taylor filed a petition for rehearing and petition for rehearing en banc on June 6, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Supreme Court, U.S.
FILED
NOV 15 2000
CLERK

(2)

No. 00-628

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Seventh Circuit properly apply the controlling decisions of this Court in ruling that an employee who interjects an accusation of racism into a litany of complaints regarding office management is not necessarily protected by the First Amendment; thereby precluding review under Rule 10.

II. Should the Supreme Court review the Trial and Appellate Courts' factual determination that Taylor failed to present sufficient evidence for a jury to conclude that she was subjected to any retaliatory action for engaging in protected speech.

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STATEMENT OF THE CASE

In February, 1994, the position of Gary City Attorney became vacant. Corporation Counsel, Hamilton Carmouche, an African-American, offered the position to a white female, Margaret Felton, after a black male turned down the appointment. (R. 73, pp. 158-159, R. 75, p. 112) Carmouche had previously discussed offering the position to Cynthia Taylor, an African-American Assistant City Attorney who had been hired by the department straight out of law school in 1993. (R. 76, p. 12 and 91) Carmouche testified that he inherited an operation that was being run by secretaries. (R.73, pp. 203-204) Felton's task was to implement stricter office regulations, contrary to the more informal way things were previously handled. (R. 77, pp. 43-44; R. 76, pp. 85-86)

Felton was the only white person in the office, and her elevation to the position of City Attorney was met with resistance, described by various witnesses as "absolute revolt". (R. 73, pp. 205 & 207) One of the attorneys in the office issued a memorandum that "repeated disobedience in

the office was affecting the work of the law department." (R. 75, pp. 204-206, Exh. 79) Taylor assumed the role of spokesperson for the secretaries in their battle against Felton. (R. 73, p. 207; R. 77, p. 47) She testified that she communicated complaints to Carmouche regarding all kinds of daily things that would go on in the office. (R. 76, p. 109) Taylor contends that Felton displayed a condescending attitude toward the secretaries, which she characterized as racially motivated. However, she testified that during the whole time she worked with Felton she never heard her use a racial slur. (R. 76. p. 76) One of the black secretaries called by Taylor flatly denied that Felton was a racist. (R. 74, pp. 233-34) Carmouche testified that Felton enrolled her son in an all-black elementary school; she invited a black police department employee and her son, whose house burned down, to move into her home for a 4-month period; and Felton voluntarily came forward and offered to take a 10% salary cut in order to save the job of an African-American secretary who was to be laid off due to budgetary cuts. (R. 74, pp. 48-52) None of this was

contested.

Rebecca Smith, who initially joined in this lawsuit, filed several grievances with the City's Personnel Committee regarding disciplinary action taken against her, (R. 74, p. 11), and Taylor testified on behalf of Smith at one of these grievance hearings regarding computer problems and the atmosphere in the office. She stated that she was going to raise a race issue, but Carmouche objected. (R. 76, pp. 174-175)

Following the grievance hearing, Taylor requested a 16-week medical maternity leave, which Felton opposed because she thought this was excessive. (R. 74, p. 130) On September 23, 1994, Taylor submitted a complaint letter to the Department of Labor alleging that Carmouche opposed her request for maternity leave, as well as a workers' compensation claim, in retaliation for her testifying at Smith's grievance hearing. The letter also included allegations of race discrimination. (R. 76, p. 43) On September 30, Taylor notified Carmouche that she planned to begin her maternity leave on October 31, and she

continued to work in the Law Department without incident until the end of October.

When Taylor returned from her maternity leave on December 19, 1994, she informed Carmouche that she would need therapy for a leg injury she had sustained one year before. Her therapy would require her to leave work at approximately 2:30 p.m. three days a week. (R. 73, pp. 137-138) Pursuant to Gary's personnel policy, Carmouche asked Taylor to secure a medical evaluation. (R. 74, pp. 29-30) The City manual makes it mandatory for an employee returning to work from any health-related leave to provide a doctor's release. (R. 74, pp. 29-30) Taylor testified that the demand was not unreasonable. (R. 76, p. 159) For several weeks the City received no response regarding the requested medical documentation of fitness for duty. (R. 74, p. 30) It then received a letter dated January 18, 1995, from the hospital stating that Taylor was not to return to work at all. (R. 74, p. 31, Exh. CEEE)

On January 25, a medical release was issued by the hospital, but it stipulated that Taylor could work only 4

hours a day and had to remain in a sedentary position. Contrary to Taylor's assertion, Pet. at 5, nothing in Exh. CEEE or in the record suggests this was a stair climbing restriction imposed because Carmouche insisted she climb stairs. The same medical report was issued on February 3. (R. 74, p. 32) Taylor was never told that she was fired, and in March, when she notified the City that she apparently was able to work full time and had in fact accepted another job, the Law Department immediately sent her a letter that she was welcome to have her job back. (R. 76, pp. 83-84; R. 74, pp. 45-46)

Taylor did not accept the offer, and instead she filed suit under the Americans With Disability Act, the Family Medical Leave Act, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, the First and Fourteen Amendments to the U.S. Constitution, as well as a State Claim for Wrongful Discharge. Smith alleged a First Amendment claim only. At the close of the plaintiffs' case, the trial judge dismissed Smith and Taylor's First Amendment Claims with respect to all speech pre-dating Taylor's

September 23 letter to the Department of Labor. That claim, together with the Title VII claims alleging race and gender discrimination and retaliation, the Family Medical Leave Act claim, the Section 1981 claim against Carmouche and Felton alleging race discrimination and retaliation, and the State claim were all submitted to the jury. The jury returned a verdict against Taylor regarding all of these claims except the First Amendment retaliation claim.

On post-trial motions, the judge entered judgment n.o.v. for Carmouche, holding that Taylor failed to present evidence from which a reasonable juror could find that Carmouche retaliated against Taylor because of the D.O.L. letter. (App. B.) The court reasoned that where the alleged retaliatory action occurs "on the heels of protected activity," this alone may establish the causal link. This, however, was not such a case because three months elapsed between the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification. Taylor, therefore, needed to come forward with additional evidence to support her

claim that the request for a medical release was "retaliatory", which she failed to do. The court concluded that "the Gary Personnel Manual required an employee returning to work to provide a doctor's release and Carmouche's decision to enforce the requirement was justified." (B-9).

The Court of Appeals affirmed the District Court's ruling on the directed verdict, disagreeing that the temporal lapse was too great to support an inference of retaliation, but agreeing that "enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech." (A-6) The Court of Appeals stressed that there was no evidence "that Carmouche enforced the rule selectively." Judge Williams, who filed a dissent regarding the protected status of the pre-D.O.L speech, agreed that Taylor had no claim "relating to her reinstatement after her medical leave." (A-11) Taylor petitioned the Court of Appeals for rehearing en banc, which was denied. (C-1)

REASONS FOR DENYING THE WRIT

This petition should be denied because the Trial Court Judge and the Seventh Circuit Court of Appeals

applied well-established First Amendment Doctrine in denying Taylor's claim. Both courts below correctly analyzed the facts under the *Connick/Pickering* multi-factor balancing test, which examines content, form, and context in deciding whether an employee's speech is protected. In reality, all Taylor seeks is to have this Court review the evidence in a voluminous record, which has been inaccurately portrayed in her petition.

A. The Seventh Circuit's Ruling That an Employee's Complaint of Racism Is Not Always Protected by the First Amendment Does Not Conflict With *Connick v. Myers*.

The Seventh Circuit did not find that Taylor's allegations of racism were unprotected solely because she complained "within the context of the personnel hierarchy" (Pet. at 14). Nor did it rule that speech was unprotected because Taylor was not engaged in "public debate." The Seventh Circuit, as well as the Trial Judge below, applied well-established First Amendment Doctrine that requires judges, not juries, to examine the content, form and context

of an employee's speech to determine whether or not it is protected. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Taylor has taken statements from the Seventh Circuit's opinion out of context and has failed to provide any basis for granting a Writ of Certiorari.

Having heard all of the evidence in this case, the Trial Court Judge directed a verdict against Taylor with respect to all of her speech that predated a September, 1994 letter to the Department of Labor. In *Connick*, this Court ruled that "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the given statement, as revealed by the whole record." 461 U.S. at 147-48. In affirming the trial judge's ruling in this case, the Seventh Circuit did not ignore the statement in *Connick* that race discrimination is "a matter inherently of public concern". Rather, it simply concluded, looking at the record as a whole, that under the circumstances in this case, interjecting a claim of racism into a litany of complaints about an allegedly dictatorial supervisor was insufficient to

convert what was basically an intra-office dispute into protected speech.

The Seventh Circuit was guided by *Connick*, where this Court found that even though some of the employee's speech concerned issues of public concern, "The speech as a whole must be deemed work-related." The Supreme Court has never ruled that content alone is determinative. Indeed, in the footnote cited by Taylor, this Court in *Connick* specifically noted that when Mrs. Givhan protested race discrimination, she spoke out "as a citizen on a matter of general concern, *not tied to a personal employment dispute...*" 461 U.S. at 148, n.8 (emphasis added). If employees are simply airing personal disagreement with the supervisor's decisions and if the point of the speech is to address the effect on that employee, the speech may not be entitled to First Amendment protection. Here Taylor's speech arose in the context of Carmouche appointing Felton as City Attorney, after having discussed appointing Taylor to the position. Taylor felt she had better rapport with the secretaries and

vehemently objected to Carmouche's choice. She herself testified that she communicated complaints to Carmouche "regarding all kinds of daily things that would go on in the office." The facts are strikingly similar to those in *Connick* where an attorney's speech arose in the context of her dissatisfaction with her boss' decision to transfer her to a different division in the law department. The Trial Judge here acknowledged that "racism is a matter of public interest," but he concluded that the evidence as a whole demonstrated "that the motive behind the plaintiffs' complaints of racism were personal and that they were related solely to disagreements that the plaintiffs had with their own working conditions." (B-15)

The context of speech helps to distinguish between a personal crusade and an interest in informing the public. Where an employee raises issues to bolster her own position in a personal dispute with superiors, the speech may not be entitled to First Amendment protection. As in *Connick*, the majority of Taylor's complaints involved office morale, intra-office policies, and grievance procedures.

Accusing one's superiors of racism or sexism, regardless of how unfounded, does not automatically elevate an employee's speech to absolute protected status. *Connick* did not require this; indeed any such rule is directly contrary to *Connick's* admonition that courts must engage in a "particularized balancing" of the competing interests, including "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 140 and 150. The Court cautioned that "Because of the enormous variety of fact situations", it was inappropriate to lay down any flat rules. *Id.* at 154.

Taylor wrongly accuses the court, Pet. at 14, of ruling that her testimony on behalf of Smith was unprotected merely because it was part of an internal grievance procedure. Rather, the court recognized that there is no definitive rule that an employee who testifies before an official government agency necessarily speaks in a context that is protected by the First Amendment. As the Seventh Circuit ruled in *Wright v. Illinois Dept. of Children & Family Serv.*, 40 F.3d 1492 (7th Cir. 1994), "Airing

private gripes in the form of a complaint or testimony cannot alter their status as private gripes."

Further, Taylor contends that the Seventh Circuit erred in confusing the law of defamation with that of employee speech when it ruled that employees who make "unsupported defamatory statements" may be penalized without offending the First Amendment. (A-10) The Seventh Circuit correctly cited *Waters* for the proposition that "So long as the employer honestly and reasonably believes that workplace speech is inappropriate or disruptive", the Constitution permits an employer to respond to that speech. (A-11) The Seventh Circuit did not engage in impermissible fact-finding. Taylor brought claims against Carmouche and Felton individually under § 1981, accusing them of racial animus in their operation of the law department, as well as retaliation. Taylor contends that Carmouche contested the allegations of racism "at trial, and he lost." (Pet. at 17) To the contrary, the jury returned verdicts in favor of both Carmouche and Felton, denying Taylor's claims of racial bias under § 1981, as well

as under Title VII. Statements made in reckless disregard for their truth about a supervisor are not entitled to full First Amendment protection. *Connick* requires courts to balance competing interests and the false, "defamatory" nature of speech is certainly relevant to this inquiry.

Even if, as in *Connick*, one aspect of Taylor's speech was of public concern, the Seventh Circuit was justified in concluding the speech was unprotected. The Court of Appeals cited extensively to *Waters v. Churchill*, 511 U.S. 661, 672-75 (1994), wherein this Court emphasized that government employers must be permitted to restrain employees who "do or say things that detract from the agency's effective operation." (A-8-9) The Trial Judge concluded that there was "united revolt, open opposition by all of the secretaries," and that Taylor was leading the secretaries' battle against Felton. One of the non-defendant attorneys in the office in this case issued a memorandum stating that "Repeated disobedience in the office was affecting the work of the law department." The Seventh Circuit correctly determined that the Gary Law

Department's right to maintain office discipline outweighed any interest Taylor had in speaking out about what she perceived to be mismanagement, even if she interjected a claim of racial bias into her grievances. The Supreme Court in *Connick*, after similarly concluding that one aspect of Myers' speech was of public concern, ruled nonetheless that the speech value was outweighed by the disruptive potential it would cause in that law department. 461 U.S. at 154.

Taylor wrongly accuses the Seventh Circuit of making factual, credibility determinations. She ignores the well-established rule that it is for the Court, not a jury, to examine "form, context, and content" to assess whether speech should be deemed to be of public concern and to determine whether, on balance, that speech is protected by the First Amendment. Further, she misrepresents the record when she asserts, Pet. at 13, that the "burden to the City of Gary from this speech is purely speculative." Here, unlike the situation in *Rankin v. McPherson*, 483 U.S. 378 (1987) relied upon by Taylor, there was not only fear that speech

would interfere with the Law Department; rather, numerous witnesses testified that the battle Taylor was leading on behalf of the secretaries was affecting the workplace. Taylor was not a "low-ranking attorney" in a municipal office who, like the employee in *Rankin*, merely made a misguided statement to a co-worker. Taylor sought to undermine Carmouche's decision to appoint Felton, and she actively interfered with the disciplinary decisions he was making with regard to the secretaries. The Court in *Connick* cited the need for employees "to maintain close working relationships with their superior" in the District Attorney's office. 461 U.S. at 151. Just as in *Connick*, Taylor's persistent attacks on her superiors was interfering with working relationships in the Law Department. The Court in *Connick* explained that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-152.

In short, the Seventh Circuit correctly applied well-established Supreme Court precedent in concluding that

based on the content, form, and context of the speech, Taylor's expression related to her personal interest as an employee and thus, even if one aspect of it may be deemed to be of public interest, it was unprotected. The Seventh Circuit correctly determined that Taylor was protesting in her capacity as an employee, and that Carmouche and Felton properly acted "in their capacity as supervisors of the Law Department rather than as regulators of private speech." (A-10, citing *Waters*)

B. The Seventh Circuit Properly Affirmed the Trial Court's Ruling That Taylor Was Not Subjected to Retaliatory Action For Filing a Letter With the Department Of Labor, And There is No Reason for the Supreme Court to Review Its Decision.

The Trial Judge did find that Taylor's September 23 letter to the Department of Labor was protected speech, and he so instructed the jury. (B-5) However, he subsequently set aside the jury's verdict for Taylor and granted Carmouche judgment as a matter of law, concluding that a reasonable jury could not find that Taylor was retaliated against for

filing the letter of protest with the Department of Labor. Taylor accuses the Seventh Circuit of finding "a new reason" to reverse the jury's verdict, but, in reality, its rationale comes directly from the Trial Judge's opinion, which stated that: "The Gary personnel manual required an employee returning to work to provide a Doctor's release and Carmouche's decision to enforce the requirement was justified." (B-9). The Seventh Circuit similarly concluded that "enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech," especially since "No evidence of record implies that Carmouche enforced the rule selectively." (A-6) The Court did not make credibility determinations -- indeed Taylor herself testified that Carmouche's demand that she secure medical certification of her ability to return to work was not unreasonable. (R-76, p. 150).

Taylor contends that the issue of whether she was "constructively discharged" after the D.O.L letter was a "question of fact." The facts were uncontested, however, that the City received no medical documentation for four

weeks. Taylor argues, Pet. at 20, that she "was still refused reinstatement," even after she submitted the medical evaluation. She fails to mention, however, that the hospital report issued on January 18, 1995, stated that Taylor was *unable* to return to work. It is also uncontested that the subsequently issued hospital reports stipulated that Taylor could work for only 4 hours a day and had to remain in a sedentary position. Contrary to Taylor's suggestion, Pet. at 5, there was absolutely no indication in these medical reports that these conditions were linked to Taylor being on the 4th floor of the law department. Taylor's medical status, as reflected in these reports, did not change through March. In March, when the City learned that Taylor could, in fact, resume full-time employment, it extended an offer to her to return.

The fact that the trial Judge may have initially decided to send this aspect of the case to a jury in no way condemns his subsequent decision, in reviewing the entire record, that the jury's verdict was unsupported by the evidence. The question of whether Taylor was retaliated

against for sending the D.O.L. letter was properly decided by the courts below, first by the trial court judge and then by the appellate court panel that unanimously affirmed this part of the decision. Taylor asks this Court to grant certiorari despite the well-established principle that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Taylor relies on this Court's recent pronouncements in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), to support her argument. *Reeves*, however, admonished courts to look to "the strength of the plaintiff's prima facie case" and "the probative value of the proof that the employer's explanation is false." This is precisely what occurred here. Unlike *Reeves*, Taylor was not able to establish a prima facie case because she had no evidence linking her protected speech to any penalty. Further, the legitimacy of Carmouche's explanation for not allowing Taylor to return to work on December 19, namely her

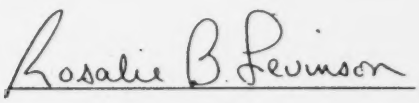
failure to secure a medical evaluation pursuant to a mandatory city policy, was not refuted by any evidence. The trial judge rejected her post-trial motion on this issue, the appellate court agreed, and her petition for en banc review was denied.

The determination made by the courts below did not involve "witness credibility" or the "drawing of inferences from facts". Taylor would have this Court re-examine a voluminous record to determine whether Carmouche's request for medical certification and his subsequent compliance with the medical evaluation was unwarranted. She points to nothing in the record, however, refuting the findings below that the City Personnel Manual makes medical certification mandatory, and that the rule was not applied any differently to anyone else. Rule 10 provides that certiorari petitions should not be granted where plaintiff merely claims misapplication of a properly stated rule of law or erroneous factual findings.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit's decision is clearly correct and conforms to settled law from this Court. Taylor does not suggest an intercircuit conflict, nor will the issues she raises have implications beyond her dispute with the City. Respondents therefore respectfully urge this Court to deny Taylor's Petition for Writ of Certiorari.

Respectfully submitted,



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No. 00-628

In the Supreme Court of the United States

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition for Writ if Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's misapplication of the standards set in *Connick v. Myers* derogates the holding of the Supreme Court that, the "right" of a municipal employee to protest racial discrimination is a matter inherently of public concern and is in conflict with other decisions of the Supreme Court and Circuit Courts.

II. Whether the Seventh Circuit invaded the province of the jury when it failed to comply with the standard of review regarding granting a judgment n.o.v. by making many factual and credibility determinations in favor of the movant.

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DISPUTED FACTS

The Respondents have presented facts to this Court that Petitioner believes are misstated, misleading and at times untrue. The Petitioner responds as follows:

Respondents state on page 1 of their brief that there was a revolt by the staff against Felton, the only white person in the office, because she wanted to implement stricter office procedures. Respondents ignore the evidence that the staff perceived Felton's behavior as racist which petitioner contends is the reason the staff had difficulty with her. (R. 76, pp. 19-20; R. 73, pp. 155-59, R. 75, pp.104-05; R. 74, p. 232). This perception by the staff and the many attempts to address it preceded most if not the entire behavior Respondents refer to as a revolt. Also, the Respondents are incorrect in stating Felton was the only white person in the office. There was another white female assistant city attorney working in the office.

Respondents' Brief, page 2, states that Taylor assumed the role of spokesperson for the secretaries. Respondents fail to mention that Taylor was the only African-American person working in the office full-time with a position higher than non-attorney staff. Taylor also held the same position as Felton when the staff initially began addressing their concerns about Felton. Therefore, Taylor was the only African-American attorney in the office, full-time, who witnessed Felton's behavior on a regular basis. It stands to reason that the staff would look to Taylor to assist them in dealing with the perceived racism by Felton. Respondents also fail to mention that subsequent to Taylor, a white male attorney

complained about the treatment of the secretaries in the law department. (R. 74, pp. 62-64; R. 77, pp. 79-81).

Respondents' Brief, page 2, suggests that because Taylor didn't hear Felton make a racial slur and that she did nice things occasionally for a needy black person that that is somehow evidence that she was not racist or did not behave in a racist manner. If the standard for determining if someone is racist is a white persons perception of what racist behavior is or, if African-Americans have to educate the courts about the various forms of racism, then African-Americans will be faced with an almost insurmountable burden and will rarely if ever have the ability to prevail in this judicial system.

In their attempt to prove Felton is not racist, Respondents ignore that many shared this perception of Felton's behavior as racist. (R. 74, p.232; R. 76, pp 19-20; R. 73, pp. 155-59; R. 75, pp. 104-05). They also neglect to mention that Felton and Carmouche were ultimately fired by the mayor who stated he was aware of the complaints of racism against them, had discussions about the complaints and that his decision to fire them included their inability to keep African-American attorneys. (R. 74,190; 192-93; 200-02). Respondents also fail to mention that there was substantial testimony that Carmouche behaved in a racist and sexist manner on a regular basis. (R. 76, pp. 22-23; R. 75, pp. 110-12; R. 76, pp. 68-70; R. 75. pp. 100, 111-13, 115; R. 75, p.5; R. 74, pp. 225-227; R. 74, pp. 75-76; R. 74, p. 257; R. 75, pp. 94-96; R. 74, pp. 64-65; R. 75, pp. 96-99, 102, 131; R. 76, p.69; R. 74, pp. 211-212, 215-16; R. 74,pp. 162, 170. The connection between the staffs' perception of Felton as racist and the fact that Felton

prospered in this racist environment surely cannot escape the observation of the Court.

Respondents' Brief, page 3, states that Taylor was going to raise racism at Smith's grievance hearing, but Carmouche objected. The more accurate statement would be that while trying to testify, Carmouche objected and Taylor was prevented from testifying further. (R. 76, p. 175).

Also on page 3, Respondents state that Felton was opposed to Taylor's medical/maternity leave because she though it was excessive. Respondents fail to mention that Felton sent interrogatories to Taylor's doctor. The doctor's answers to the interrogatories detailed Taylor's condition, the reason she needed a leave and the potential for further injury if she did not receive it. (R. 73, pp. 116-121; R. 76, p. 157, ex. 36).

On page 4, Respondents' state that Taylor worked without incident after giving notice that her maternity leave would begin October 31. Respondents neglect to mention that on October 3, 1994, Taylor had a grievance hearing that was interrupted by the intervention of the deputy mayor and the next morning Carmouche and Felton approached Taylor with an agreement to resolve the grievance. (R. 74, p. 126; R. 76, p. 52-53). This is why Taylor worked without incident until her maternity leave.

Also on page 4, Respondents state Taylor requested therapy for an injury she received a year before and the City's personnel policy made it mandatory that she receive an evaluation. Respondents neglect to mention that they were fully

aware of the continuing problems Taylor had with the injury as evidenced by her therapy in July 1994 and the interrogatories they requested in September 1994. (R. 73, pp. 116-121; R. 76, p. 157, ex. 36). They also fail to mention that they never advised Taylor of the need for an evaluation prior to the day she returned from maternity leave (R. 76, p. 185); that, Taylor contacted Felton on December 16, 1994 and advised her of the therapy but was not advised of the need for an evaluation (R. 76, p. 157-58); that, Taylor was never required to secure a medical evaluation when she initially returned to work after the injury nor was she required to secure one for her maternity; that, Carmouche stated that he made the policy in the law department; and the personnel policy was typically not followed in the law department. (R. 73, pp. 100, 127, 129; R. 76, pp. 157-58; R. 77, pp. 67-68; R. 77, pp. 101-113).

The Respondents further state, on page 4, that the City did not receive a response as to Taylor's fitness for duty for "several weeks". Respondents neglect to mention that Taylor testified that she contacted the City's doctor immediately to set an appointment. (R. 76, p. 159). Respondents also neglect to mention that the request for the evaluation was made on December 19, 1994 and that between that time and the time the City's doctor sent his documentation on January 18, 1995, the Christmas and New Year holidays occurred; that the City has documentation that Taylor was seen by the City's doctor on January 6 and 11,1995 (ex.); and, that the City's doctor requested and received a medical report from Taylor's doctor on January 16, 1995 (ex.).

The statements in Respondents' Brief, pages 5

and 19, deceptively attempt to present to this Court that Taylor's work restrictions that were imposed by the City's doctor had nothing to do with the requirement that she work on the fourth floor. The fourth floor office required Taylor to walk up two and a half flights of stairs. The law department is not handicap accessible. The record clearly demonstrates Respondents insistence that Taylor work on the fourth floor. (R. 73, p. 134; R. 76, pp 162-64, 166; R.74, p. 25). Respondents attempted to force this requirement in August 1994 and made it a condition of Taylor's return to work after her maternity leave. (R. 73, p. 134; R. 76, pp. 52-54, ex. 36). Respondents make reference to a letter welcoming Taylor back to work but fail to mention the two letters in response where Taylor again addresses the issue of her inability to climb stairs and that being the reason for her work restrictions. (ex.) Additionally, Respondents attempt to make Taylor responsible for the actions of the City's doctor. Taylor had no control over what their doctor recommended or what he included in any report he submitted.

Respondents also state, on page 5, that Taylor was never told she was fired and took another job. They fail to state that Respondents refused to pay her and blocked her from receiving workman's compensation thus she had no income and a new baby since December 1994. (R. 73, p. 133; R. 77, p. 65). They also fail to state that Taylor in fact continued to work with restriction, received therapy and endured two surgeries while employed at her new job. (R. 76, p. 15).

On page 21, Respondents argue that Taylor did not refute that the City's Personnel Manual made medical certification mandatory or that the rule was

applied differently. On the contrary, Taylor argued that the rule was applied selectively. Taylor testified that the rule was never applied to her prior to her return from maternity leave and that the personnel manual was only selectively used in the law department. (R. 73, pp. 100, 127, 129, 141; R. 76, pp. 157-58; R. 77, pp. 67-68; R. 77, pp. 101-113). Additionally, Taylor presented evidence that she was treated differently, for example, Felton while holding the same position as Taylor, assistant city attorney, was allowed several weeks off with pay to care for her child who had chicken pox yet, Taylor was not allowed to attend therapy for two hours three times a week. (R. 77, pp. 89-90). Additionally, prior to Taylor's maternity leave she was forced to return to work over her doctor's objection, but after her return she was not allowed to return to work even though she had approval by her doctor. (R. 77, p. 101). Respondents also fail to mention that Felton made plans to give Taylor's position to another person prior to Taylor's return from her leave. (R. 77, p. 72).

Throughout the remainder of Respondents' Brief they attempt to use these misstated facts to support their argument. They also mischaracterize Taylor's role as it related to her involvement with the secretaries as that of leading a battle for the secretaries and actively interfering with the disciplinary decisions regarding the secretaries. They fail to mention that prior to Felton's promotion to City Attorney, there was an open door policy with Carmouche to come in and discuss anything with him and that many times Carmouche called Taylor and Smith into his office to discuss office matters. (R. 73, pp. 155-59, R. 75, 104-05). They also fail to mention that Carmouche transferred Smith, the most

vocal secretary regarding Felton's perceived racist behavior, to be Felton's secretary in July 1994. (R. 73, p. 102). He did this knowing full well there were problems between the two. They further fail to mention that Carmouche told Felton that Smith said she was racist. (R. 75, p. 107). The alleged battles in the office, if any, were fueled by Carmouche.

The Respondents classify Taylor's role as being involved in a battle but, there is no evidence that Taylor did anything more than have private discussions with Carmouche and his superiors. Additionally, the only disciplinary decision regarding a secretary Taylor had any involvement with was her testimony at Smith's grievance hearing.

REASON FOR GRANTING THE WRIT

This Petition Should Be Granted Because The Seventh Circuit Has Derogated the Holding of the United States Supreme Court in *Connick v. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern. The Seventh Circuit's Ruling That an Employee's Complaints That a Supervisor Acted in a Racist Manner Is Not Protected Speech Because it Is Not a Political View about What Legal Policies the Employer Should Adopt; And, That an Employee's Subpoenaed Testimony on Behalf of a Co-worker Is Not Protected Because it Occurred in the Context of an Internal Grievance Hearing Is in Conflict with Decisions of the United States Supreme Court and the Circuit Courts. Additionally, Although Federal Rule of Civil Procedure 50 Requires That All Evidence and Inferences Must Be Taken in the Light

Most Favorable to the Non-Moving Party, the Seventh Circuit Invaded the Province of the Jury When it Made Numerous Factual and Credibility Determinations After the Jury's Verdict While Drawing Inferences in Favor of the Moving Party.

CONCLUSION

Respondents' statement of the case is deceptive. Petitioner could continue to address each fact provided by Respondents and present evidence showing it was either misstated, mischaracterized or that relevant facts were omitted.

Petitioner was placed in the arduous position of either speaking out against racism in the City of Gary Law Department or being a quiet participant by saying nothing. Taylor spoke out on behalf of the staff, other African-American attorneys and the citizens as a whole. Taylor attempted to address these concerns with Carmouche and his superiors and was retaliated against as a result. Taylor's only recourse was to utilize the judicial system and exercise her right to a jury trial. In spite of the trial judge dismissing the majority of her case and not having a jury of her peers, Taylor still prevailed.

The facts in this case are clearly in dispute and the Respondents lacked any credibility at trial. In ruling in this case, the lower courts were required to look at the facts in the light most favorable to the Petitioner, the non-moving party, and they did not. Instead, they viewed the facts in the light most favorable to the Respondents who consistently misrepresented the facts. To allow the lower courts to

ignore the standard of review or deem this case a misapplication of the facts amounts to denying petitioner and all similarly situated victims of discrimination access to a jury and thus to justice. This case belongs before a jury, the trier of facts.

For these and all the reasons presented in Petitioner's Writ of Certiorari, Petitioner urges this Court to reverse the decisions of the courts below and reinstate the jury verdict and/or remand this case for trial.

Respectfully Submitted,

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